

ORIGINAL

FILED

December 10 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0578

HERMAN GONZALES; FAWN LYONS; KEN LAUDATO; LAWRENCE
WALKER; GARY MANSIKKA; GARY GALETTI; GREG WHITING;
MARVIN KRONE; RICHARD BLACK; JIM KELLY; CHRIS SOUSLEY, and all
others similarly situated,

Plaintiffs and Appellees,

-VS-

MONTANA POWER COMPANY; NORTHWESTERN CORPORATION, a
Delaware corporation; NORTHWESTERN CORPORATION, a Delaware
corporation, as a reorganized debtor, subsequent to its plan confirmation,
hereinafter referred to as NOR; NORTHWESTERN CORPORATION d/b/a
NORTHWESTERN ENERGY; PUTMAN AND ASSOCIATES, INC., a Montana
corporation; and JOHN DOES II and III and JOHN DOES IV thru XX,

Defendants and Appellants.

**APPELLEES' MOTION FOR EXPEDITED PROCEEDINGS
AND SUSPENSION OF THE RULES**

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*Attorneys for Defendant and
Appellant Putman & Associates,
Inc.*

COME NOW Plaintiffs/Appellees and submit this Motion for Expedited Proceedings and Suspension of the Rules, along with a supporting affidavit pursuant to Rule 29 of the Rules of Appellate Procedure.

POSITION OF OPPOSING PARTIES

Pursuant to Rule 16, R. App. P., opposing counsel have been contacted, and object to this Motion to Expedite.

FACTUAL BACKGROUND

This case was filed in Butte-Silver Bow County District Court in December 1998. Initially, the case existed as a number of individual bad faith cases for claims that Montana Power Company, as a workers' compensation self-insurer, had mishandled individual workers' compensation cases. One of the cases was from an injury in 1979 and others had also occurred years earlier. More and more individual workers' compensation claims were discovered, where benefits were not paid when required, resulting in filing of the petition for class action in Workers' Compensation Court in March, 1998.

The *Gonzales* District Court case has incurred several delays that have complicated final adjudication. Service was delayed because of the ongoing and related class action for determination of impairment benefits in Workers' Compensation Court, *Gonzales, et al. v. Montana Power Company, et al.*, WCC#

9803-7941 [hereinafter referred to as “*Gonzales WCC*”]. The *Gonzales WCC* class action has in excess of one hundred class members, whose delayed impairments, along with applicable penalties and attorneys fees, were determined by a Special Settlement Master. Many of the claims stem from injuries back in the 1980’s; and many of the workers were not paid until 2000 or later. The *Gonzales WCC* case continues to be adjudicated and is currently involved with certain appeals to the Workers’ Compensation Court. The *Gonzales WCC* class action involves the determination of impairment benefits by a Special Settlement Master under the supervision of the Workers’ Compensation Court.

A companion case, *Nees, and all Others Similarly Situated v. NorthWestern Corporation, Employer and Insurer*, WCC #2007-2004, is pending in Workers’ Compensation Court for judicial determination as to a second workers’ compensation class action for *Gonzales WCC* class members involving workers’ compensation penalties and other matters not covered in the initial *Gonzales WCC* class action.

Further delays were incurred in the underlying district court case in this action, *Gonzales, et al. v. Montana Power, et al.*, DV 98-253 [hereinafter referred to as “*Gonzales District Court*”]. In the *Gonzales District Court* action, bankruptcies were filed by NorthWestern Corporation, inclusive of Montana

Power Company (“MPC”), resulting in significant delays in adjudication and the necessity for Bankruptcy Court determinations. These bankruptcy proceedings stayed proceedings in the *Gonzales* District Court action and the *Gonzales* WCC action.

A copy of the District Court decision certifying the class is attached hereto as Exhibit A. The District Court’s order is subject to an interlocutory appeal. Rule 6(d), R. App. P. All of the named defendants, except the unrepresented old NorthWestern Corporation¹ have filed Notices of Appeal. There has been no decision on the merits. The sole issue that can be subject to appeal is the Court’s certification order set forth as Exhibit A. As a part of its certification order, the District Court created a class definition as follows:

MPC employees with compensable worker compensation claims, with permanent impairment ratings under an edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, injured between January 1, 1970, and March 28, 1998, and not paid an impairment award until after December 10, 1997, and that such outlined above employee falls within one or more of the following categories:

- a) sustaining damages because of MPC’s improper claims handling and adjusting procedures, or
- b) sustaining damages because of NWE’s improper claims handling

¹The old NorthWestern Corporation (pre-bankruptcy) is subject to default, and prior to Notice of Appeals and resulting stay, a default order was prepared by the Plaintiffs, but not presented to the District Court.

and adjusting procedures; or

c) sustaining damages because of NOR's improper claims handling and adjusting procedures; or

d) sustaining damages because of Putman's improper claims handling and adjusting procedures that were the obligation of Putman as third-party administrator for MPC, NWE and NOR, and as a independent reviewer for MPC.

Order Granting Certification of Class Action Except for Fraud and Granting Leave to File Sixth Amended Complaint, p.4, Judge Kurt Krueger, September 30, 2009, *Gonzales, et al. v. Montana Power Co., et al.* DV 98-253. (See Exhibit A.)

The District Court set forth a class of individuals, retroactive to January 1, 1970, *Id.* It has been the experience of counsel for Appellees, in the *Gonzales* WCC class action, that since some of the workers' compensation injuries happened more than thirty years ago, some of the claimants have passed away, resulting in requests for determination of benefits on behalf of estates. *See* Supporting Affidavit of Lon J. Dale, p. 5, ¶ 11.

Delays in this case could affect potential class members who have not received notice of their potential involvement in the District Court class. Although the *Gonzales* WCC class exists, it is confined to workers' compensation benefits known as impairment benefits, and the Workers' Compensation Court has limited the case to impairment benefits, penalties, and attorneys fees. The Workers' Compensation Court does not have jurisdiction over bad faith claims. Therefore,

the individuals involved in the *Gonzales* WCC initiated the District Court action in order to obtain damages not available through the Workers' Compensation Court.

ARGUMENT AND STANDARD FOR REVIEW

All of this procedure leaves the Appellees and potential class members in a difficult situation that is very time sensitive due to the lapse of time between the injury and determination of benefits. There is a heightened standard of review for a class certification; i.e., abuse of discretion. *McDonald, et al. v. Washigton, et al.*, 261 Mont. 392, 396, 892 P.2d 1152 (Mont. 1993), *citing, Murer v. State Fund*, 257 Mont. 424, 435, 849 P.2d 1036, 1037 (Mont. 1993). Should this Court affirm the District Court, the decision will be affirming the class certification order, thus allowing the underlying case to proceed to a final determination on the merits as a class action. As such, this is not a complicated appeal involving a significant record, nor a complicated review process.

RELIEF REQUESTED

As supported by the Affidavit of Lon J. Dale, pursuant to Rule 29, R. App. P., the Appellees' request a suspension of the rules to provide for an expedited decision on the interlocutory appeal from the District Court's Order Certifying a Class Action. The Appellees hereby request that no extension for briefing be allowed. The Appellees further request that this case be set for expedited ruling at

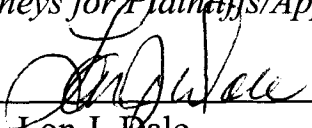
the conclusion of the briefing. Significant prejudice can occur to unknown and un-notified class members by any significant delays in adjudication. The Appellees will also be filing a motion for reinvestment of jurisdiction to allow the District Court the authority to continue its work on the class action notice and supervision of ongoing discovery. All transcripts have been received. Appellants' briefs are due January 4, 2010. Appellate mediation is scheduled for January 6, 2010. Answer briefs will be due February 3, 2010. Appellant's Reply Brief will be due February 18th. The Court is hereby requested to not allow any extensions to the briefing schedule, as enter an expedited ruling as soon as possible after the conclusion of the briefing process.

DATED this 8th day of December, 2009.

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Attorneys for Plaintiffs/Appellees

By: _____


Lon J. Dale

CERTIFICATE OF COMPLIANCE

This Motion is in compliance with Rule 16(3) and contains less than 1,250 words of proportionately spaced, 14pt Roman text.



CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by the means designated below this ____ day of December, 2009:

☒ U.S. Mail
☐ Fed Ex
☐ Hand-Delivery
☐ Facsimile
☐ Email

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9219/3 (kwp)
c: Chris Ragar

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IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0578

Plaintiffs and Appellees,

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

Defendants and Appellants.

**AFFIDAVIT OF LON J. DALE
IN SUPPORT OF SUSPENSION OF THE RULES**

AFFIANT, being duly sworn upon his oath, deposes and states the following, in support of Rule 29, Motion for Suspension of the Rules:

1. I am co-counsel with Chris Ragar for Plaintiffs and Appellees in the

above referenced litigation. The first aspect of this case was filed in 1998. I am also co-counsel in the related class action in the Montana Workers' Compensation Court, Cause No. 9803-7941, *Gonzales, et al. v. Montana Power Company, et al.*

2. The Montana Workers' Compensation Court class action, Cause No. 9803-7941 (hereinafter referred to as "*Gonzales WCC*"), was filed in March, 1998; and the action in the Second Judicial District Court, Butte-Silver Bow County, Cause No. DV 98-253 ("*Gonzales D.C.*"), was filed in December 1998. The District Court action began as a series of individual bad faith cases regarding the handling of workers' compensation claims, but after numerous cases were discovered, certification was requested.

3. The *Gonzales D.C.* action, although filed in December, 1998, was not served on the initial Defendant, Montana Power Company, until February 2001.

4. In the *Gonzales WCC* class action, a Special Settlement Master ("SSM") was appointed by the Workers' Compensation Court, and a Special Settlement Procedure (SSP) was agreed to for the purpose of determining if Montana Power Company employees, who were injured on the job, had properly received their medical impairment awards as required by Montana workers' compensation statutes. By agreement, the litigation was to be a class action.

5. As a consequence of the class action determination, the Special

Settlement Master (SSM) began the process of reviewing Montana Power Company workers' compensation claims and sending injured workers who should have received impairment ratings for independent medical evaluations for ascertainment of impairment pursuant to the American Medical Associations' Guides to the Evaluation of Permanent Impairment, 5th Edition.

6. The SSM reviewed workers' compensation claim files provided by Montana Power and its successor in interest, NorthWestern Corporation, d/b/a NorthWestern Energy, to determine if impairments were due and whether an unreasonable delay occurred between the time of injury and when Montana Power or NorthWestern Energy sent the worker for an impairment evaluation, or if there was an unreasonable delay between the time of the impairment evaluation and payment of PPD benefits owed. The SSM identified those files wherein delays appeared to have occurred and directed Montana Power Company/NorthWestern Corporation to send copies of the claims files to the Petitioners' and Respondents' attorneys for review and submission of a penalty position statement to the SSM. After review of the claims file by the parties' attorneys, each side would submit a penalty position statement to the SSM. After review of the position statements, if the SSM determined an unreasonable delay had occurred, he would order a penalty be paid to the claimant by Montana Power Company, or later, NorthWestern

Corporation, pursuant to the Workers' Compensation statutes. A sum equal to the penalty amount would be paid to the Petitioner/claimants' attorneys pursuant to the terms of the SSP. The Court imposed a 20% penalty under Mont. Code Ann. §39-71-2907, for unreasonable delay or denial in over 100 of the old MPC workers' compensation claims.

7. To date, the *Gonzales* WCC action has resulted in the payment in excess of \$600,000 to 124 former Montana Power injured workers for impairment benefits—and work continues.

8. The Stipulated Settlement Procedure was approved by Court Order on September 13, 2000, and the process of reviewing and referral of files by the SSM began. NorthWestern Energy Corporation purchased Montana Power in approximately 2001 and then filed a bankruptcy petition on September 14, 2003. A Notice of Bankruptcy Stay was filed on September 23, 2003 in *Gonzales* WCC on September 25, 2003 in *Gonzales* D.C.

9. NorthWestern Corporation's bankruptcy reorganization plan was approved by the Bankruptcy Court on October 18, 2004. A Bankruptcy Stipulation and Settlement Agreement was approved by the Workers' Compensation Court on September 28, 2005, and by the *Gonzales* D.C. on November 29, 2005, and litigation resumed. This was two years after the filing of

the bankruptcy stays.

10. On December 19, 2008, Defendant Appellee North Western Corporation filed a Petition for Writ of Supervisory Control to Montana Second Judicial District Court, Butte-Silver Bow County, The Honorable Kurt Krueger Presiding. On February 13, 2009, this Court Granted the Petition for Writ of Supervisory Control with Terms.

11. The *Gonzales* D.C. litigation and *Gonzales* W.C. class action both commenced in 1998. We are now approaching the end of the year 2009. Two of the *Gonzales* class action claimants have passed away, one from natural causes, and the other was a lineman killed while on the job for North Western Corporation. Another one of the class members, Gary Mansikka, has suffered a severe, and debilitating stroke. The class members are aging, almost 40 years have passed since January 1, 1970. Time is a critical factor in obtaining for these employees the workers' compensation benefits due them and for determination of the claims asserted in this litigation.

12. No notice provisions for the court ordered class have been judicially determined because, although the District Court had started this process, its work was stopped by the filing of the interlocutory appeals on class certification.

13. The standard for review that applies to the District Court's Order

requiring class certification is abuse of discretion. *McDonald, et al. v. Washington, et al.*, 261 Mont. 392, 296, 892 P.2d 1152 (Mont. 1993). Under the applicable provision, the abuse of discretion criteria is the highest standard for review of the District Court's actions.

14. Based upon each of the *Gonzales* WCC members receiving impairments being in the District Court class, there will be a minimum of 110 individuals in the class that Judge Krueger certified.

15. The *Gonzales* WCC class action has resulted in claims being reviewed back to 1975, and motions are pending before the Workers' Compensation Court to expand the review as to impairments back to 1970.

16. Judge Krueger's class definition provides for review back to 1970. *See Order*, p. 4., 9/30/09, attached hereto as Exhibit A.

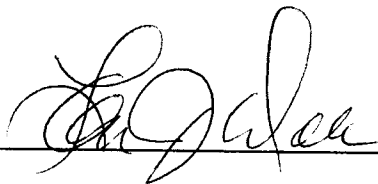
17. There may well be individuals who have no knowledge of entitlement because they have not yet been identified or notified.

18. Time is of the essence. Through no fault of the class members, bankruptcies and appeals have delayed adjudication.

19. In fairness to the numbers of individuals involved, and the lapse of almost forty years from 1970, this appeal ought to be adjudicated as soon as possible, rather than further delayed by the court's adjudication of matters filed

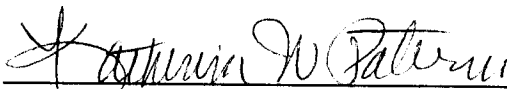
prior in time.

FURTHER, AFFIANT SAITH NAUGHT.



SUBSCRIBED AND SWORN to this 8th day of December, 2009.




Printed Name: Katherine W. Paterni
Notary Public for the State of Montana
Residing at Missoula
My Commission Expires: 9/8/2012

9219/3 (kwp)

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0578

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-VS-

MONTANA POWER COMPANY; NORTHWESTERN CORPORATION, a
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Defendants and Appellants.

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

ATTACHMENT A

**TO APPELLEES' MOTION FOR EXPEDITED PROCEEDINGS
AND SUSPENSION OF THE RULES**

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DATE REC'D 10-6-09
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FILED BY OCT 02 2009
By: Lori Maloney, Clerk
S. MCGOWAN
Deputy Clerk

MONTANA SECOND JUDICIAL DISTRICT, SILVER BOW COUNTY

HERMAN GONZALES, FAWN LYONS,
KEN LAUDATO, LAWRENCE WALKER,
GARY MANSIKKA, GARY GALETTI, GREG
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BLACK, JIM KELLY, CHRIS SOUSLEY,
and All Others Similarly Situated,

Plaintiffs,

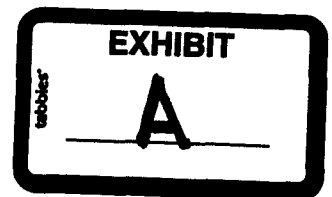
vs.

MONTANA POWER COMPANY;
NORTHWESTERN CORPPORATION, a Delaware
Corporation; NORTHWESTERN CORPORATION,
a Delaware corporation, as a reorganized debtor,
subsequent to its plan confirmation, hereinafter
referred to as NOR; NORTHWESTERN
CORPORATION d/b/a NORTHWESTERN
ENERGY; PUTMAN AND ASSOCIATES, INC., a
Montana Corporation; and JOHN DOES II and III
and JOHN DOES IV thru XX.

Defendants.

CAUSE NO. DV-98-253

**ORDER GRANTING CERTIFICATION OF CLASS ACTION
EXCEPT FOR FRAUD AND GRANTING LEAVE TO FILE
SIXTH AMENDED COMPLAINT**



This matter came before the Court by Plaintiffs' Motion for Leave to File Sixth Amended Complaint and Plaintiffs' Motion to Certify a Class Action. On May 4, 2009, the Court conducted a hearing regarding Plaintiffs' Motions. A second hearing was conducted on July 8, 2009, discussing in part some of the issues addressed at the May 4, 2009, hearing. Appearing at both of the hearings on behalf of Plaintiffs were Chris J. Ragar, Esq., and Lon J. Dale, Esq.

Appearing on behalf of Defendant Reorganized Northwestern Debtor Corporation, hereinafter NOR, was Oliver H. Goe, Esq. Appearing on behalf of Putman and Associates was Jason Ritchie, Esq. Additionally, Joe Seifert, Esq., appeared on behalf of Montana Power Corporation, hereinafter MPC, at the July 8, 2009, hearing. Browning, Kaleczyc, Berry & Hoven were allowed to withdraw as counsel for MPC and pre-bankruptcy/debtor NorthWestern Corporation, dba NorthWestern Energy, hereinafter NWE. Regarding the issues dealt with in this Order, the Plaintiffs have asked the Court to allow them to file a Sixth Amended Complaint and for leave to file a class action against Defendants. All Defendants argued that allowing the Sixth Amended Complaint would be prejudicial at this point and further provided several arguments as to why a class should not be certified.

First, the Court will grant Plaintiffs' leave to file their Sixth Amended Complaint. Rule 15(a) of the Montana Rules of Civil Procedure states that "... leave (to amend) shall be freely given when justice so requires." While the Court is granting leave to amend, the Court notes sincere concern regarding the length of litigation and the numerous amended complaints submitted to the Court. However, the Court's Third Order Scheduling Jury Trial dated May 27, 2008, set out that the parties were allowed until September 10, 2008, in which to amend their pleadings. Plaintiffs' Motion for Leave to File Sixth Amended Complaint was filed on July 3, 2008, well before the September 10, 2008, deadline. Therefore, the Court will grant Plaintiffs' Motion for Leave to File Sixth Amended Complaint.

Next, the Court will grant Plaintiffs' Motion to Certify a Class Action. However, the Court will limit Plaintiffs' Motion to Certify a Class Action in respect to Plaintiffs' allegations concerning fraud. Due to the substantial individual findings that must be made to prove fraud, the Court is not convinced that fraud can be dealt with within a class action. Therefore, the Court will approve the Class Action as set out in the following reasoning, except as to the fraud counts.

Brief History of the Case

This matter arises from an action filed in 1998. Since 1998 the Court has received numerous filings and the matter was stayed for a brief time while NWE was in bankruptcy proceedings. Plaintiffs have essentially pled that MPC manipulated worker compensation claims and benefits dating back to 1977. Further, that NWE and NOR as a reorganized debtor post

bankruptcy continued with the same practices of MPC's manipulation of worker compensation claims. Putman & Associates were hired as a third party administrator to administer and handle worker compensation claims for MPC. Plaintiffs argue that MPC and the subsequent organizations that followed intentionally manipulated and mishandled worker compensation claims. Plaintiffs have also further gone on to assert that the mishandling of these claims were pervasive throughout the organization and its employees.

Timeliness

Before the Court can determine the merits of certifying a class action, the Court must resolve Defendants', MPC, NWE and NOR, contention that the class action was not timely raised. The general basis for the above Defendants' contention is that Plaintiffs filed their Complaint ten years prior to even moving for a class action. Defendants argue that waiting this length of time is prejudicial to Defendants. The Court does not agree with Defendants. While the Court does acknowledge the length of time this litigation has been pending, the Court finds that the class certification is timely. Specifically, Plaintiffs raised allegations of a class action in their Second Amended Complaint in February 2003, and the litigation was then stayed while Defendants went through bankruptcy proceedings. Lastly, this Court conducted a Scheduling Conference on May 13, 2008, and subsequently issued an Order on May 27, 2008, setting a deadline of December 1, 2008, in that any motion for class certification had to be filed and briefed. Plaintiffs timely filed their motion and brief on November 10, 2008, well within the deadlines set by this Court. Therefore, the Court finds that the Motion for Class Certification was timely filed by Plaintiffs.

Class Action

Class actions are designed to serve three purposes: 1) to facilitate judicial economy by avoiding multiple suits on the same subject matter, *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 550, 94 S. Ct. 756, 764-65, 38 L.Ed.2d 713 (1974); 2) to provide a feasible means of asserting the rights of those who would have no realistic day in court if a class action was unavailable, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 2973, 86 L.Ed.2d 628 (1985); and 3) to deter inconsistent results by assuring a uniform determination. *First Federal of Michigan v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989). The Montana Supreme Court has explained that trial courts are given broad discretion in determining class certifications

and that “the trial court is in the best position to determine if the case is properly litigated as a class action.” *McDonald v. Washington*, 261 Mont. 392, 405, 862 P.2d 1150, 1158 (1993) citing (*Doninger*, 564 F.2d at 1309). Further, a court can alter or amend a class action before a decision on the merits. Rule 23(c)(1) Mont. R. Civ. P. (2009).

Class Definition

An essential characteristic of a class is the class definition. The class definition “must be sufficiently definite to enable the court to determine if a particular individual is a member of the proposed class.” *Pottinger v. City of Miami*, 720 F. Supp. 955, 957 (S.D. Fla. 1989). While the Plaintiffs provided alternative definitions for the Court, the Court finds that the Plaintiffs’ language is sufficient to characterize the class. Therefore, the Court hereby determines that the following definition shall be used:

MPC employees with compensable worker compensation claims, with permanent impairment ratings under an edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, injured between January 1, 1970, and March 28, 1998, and not paid an impairment award until after December 10, 1997, and that such outlined above employee falls within one or more of the following categories:

- a) sustaining damages because of MPC’s improper claims handling and adjusting procedures; or
- b) sustaining damages because of NWE’s improper claims handling and adjusting procedures; or
- c) sustaining damages because of NOR’s improper claims handling and adjusting procedures; or
- d) sustaining damages because of Putman’s improper claims handling and adjusting procedures that were the obligation of Putman as third-party administrator for MPC, NWE and NOR, and as an independent reviewer for MPC.

Class Requirements

In order to certify a class action, Plaintiffs must establish that the prerequisites set out in Rule 23 Mont. R. Civ. P. have been met. Rule 23 is divided into two subcategories that each contains additional requirements.

A. The Requirements of Rule 23(a) have been established.

Plaintiffs have sufficiently met their burden pursuant to Rule 23(a). The Rule states that:

“Rule 23(a). Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

1) Numerosity

Plaintiffs have established the numerosity requirement in this matter as to MPC, NWE, NOR and Putman & Associates. Rule 23(a)(1) requires a class to be so numerous that joinder of all members is impracticable. In order to establish numerosity, the Court looks to several factors including “the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined, and their geographic dispersion. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). Here, Plaintiffs have identified at least 110 individuals with 117 claims in this litigation as to claims against MPC. Further, NWE acquired the assets and liabilities for MPC and that NOR is the reorganized debtor of the former NWE. Lastly, Putman & Associates was responsible for handling and adjusting the claims of MPC, NWE and NOR. Therefore, due to the large number of Plaintiffs with worker compensation claims and allegations regarding the payments of those claims, the Court finds that judicial economy will best be served by the use of a class action and, therefore, finds that this element is met.

2) Commonality

Plaintiffs have established that questions of fact and law are common to the purported members of the class. Rule 23(a)(2) requires that there are questions of law or fact common to the class. The Supreme Court has explained that Rule 23(a)(2) does not require every question of law or fact be common to every member of a purported class. *McDonald*, 261 Mont. at 401, 862 P.2d 1150 at 1155. In fact, the Montana Supreme Court has gone on to explain that the commonality element is met if a single issue is common to all. *Ferguson v. Safeco Ins. Co. of America*, 2008 MT 109, ¶ 16, 342 Mont. 380, ¶ 16, 180 P.3d 1164, ¶ 16 (2008) (citing *McDonald*

v. Washington, 261 Mont. 392, 401, 862 P.2d 1150, 1155 (1993)). Here, Plaintiffs allege that all Plaintiffs were employed by MPC, sustained worker compensation injuries, and that the payments were either not paid, delayed, or discounted. Plaintiffs allege that MPC's scheme was to deny or delay benefits. Plaintiffs further assert that NWE acquired the worker compensation liabilities and like MPC, failed to administer benefits. Further, NOR was the entity that emerged from NWE's bankruptcy. Lastly, Putman and Associates was the worker compensation plan administrator for MPC, NWE and NOR. Plaintiffs argue that Putman & Associates was the agent for administering the benefits. In conclusion, the Court finds that there are several common elements of legal and factual issues arising between the Plaintiffs and MPC, NWE, NOR and Putman & Associates. Therefore, the Rule 23(a)(2) commonality requirement is satisfied by the Plaintiffs.

3) Typicality

Plaintiffs have established that typicality requirement in that class representatives share issues common to other class members and will advance the interests of the class. Rule 23(a)(3) requires that the claims of the representative parties are typical to the claims of the class. The Montana Supreme Court has explained that

"The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named Plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class . . . The named Plaintiff's claims will be typical of the class where there is a nexus between the injury suffered by the Plaintiff and the injury suffered by the class. Thus, a named Plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory."
McDonald, 261 Mont. at 402, 862 P.2d at 1156. (citations omitted.) (citing *Jordan*, 669 F.2d at 1321).

Rule 23(a)(3) is permissive in that representative claims are typical if they are co-extensive with those absent members and need not be substantially identical. *Alexander v. JBC Legal Group, P.C.*, 237 F.R.D. 628, 631 (D. Mont. 2006) (citing *Hanlon*, 150 F.3d at 1020). In the case before this Court, Plaintiffs again allege that MPC was dilatory in handling worker compensation claims and benefits, that NWE inherited MPC's claims, that NOR maintained

responsibility under the bankruptcy stipulation, and that Putman & Associates failed to properly adjust and administer the claims. As stated under the previous factors, Plaintiffs all shared employment with MPC and were injured by the conduct of the entities dealing with their worker compensation claims. Clearly, the class representatives share the same issues and will advance the interests of the class as they have all been allegedly injured by the processing of the worker compensation benefits. Therefore, the Court finds that Plaintiffs have established their burden pursuant to Rule 23(a)(3), typicality.

4) Adequacy of Representatives

Plaintiffs have established that Plaintiffs' counsel is qualified to conduct the litigation and that the class representatives will protect the interests of the class. The final requirement of Rule 23(a) explains that the representative parties will fairly and adequately protect the interests of the class. The Supreme Court has explained that pursuant to the requirement of Rule 23(a)(4) adequacy, that there are two requirements that must be met to satisfy this final requirement. *McDonald*, 261 Mont. at 403, 862 P.2d at 1156 (citations omitted) (citing *Jordan*, 669 F.2d at 1323). The two requirements include an analysis of whether the representative can fairly and adequately protect the interests of the class and that their interests are not antagonistic to the class and whether the representative's attorney is qualified, experienced, and capable of conducting the litigation. *Id.* First, the named class members have demonstrated that they are neither antagonistic to the class and will protect the interests of the class. The named class members have mainly been involved in this litigation since 1998 and helped preserve several of the claims sought during the pendency of NWE's bankruptcy proceedings. The named class members were affected by the alleged policies regarding the distribution of worker compensation benefits and continue to persevere in the present litigation. Second, the Plaintiffs' attorneys are experienced worker compensation attorneys, licensed to practice law in Montana, and have been with the litigation through worker compensation court proceedings and NWE's bankruptcy proceedings. Therefore, the Plaintiff's counsel have demonstrated they can conduct the litigation. Therefore, the Court finds that Plaintiffs have established their burden pursuant to Rule 23(a)(4) adequacy. As previously stated, Plaintiffs have established their burden to MPC, NWE, NOR and Putman & Associates as set out previously throughout this Order.

B. The Requirements of Rule 23(b) have been established.

Plaintiffs have sufficiently met their burden pursuant to Rule 23(b). The Rule states that:

Rule 23(b). Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As stated previously in this Order, Plaintiffs have sufficiently met the requirements of Rule 23(a). In addition to the requirements of Rule 23(a), Plaintiffs must also establish either sections (1), (2), or (3) of Rule 23(b) to maintain the class action. Plaintiffs assert that they can satisfy either (1) or (3) or both.

First, Rule 23(b)(1) requires that the Court must consider whether the prosecution of the separate actions by individual members would create risks of either inconsistent adjudications

and standards for the opposing parties or whether adjudication with respect to an individual member would be dispositive of the interests of other members or impair their ability to protect their interests. Here, Plaintiffs have several allegations against all Defendants. Among the allegations, Plaintiffs have alleged Defendants committed Common Law Bad Faith and Breach of a Fiduciary Relationship. Here, the Court would note that over 100 actions regarding the above allegations will likely render inconsistent verdicts and standards for all of the Defendants. Further, combining the actions into one class action would only benefit both Plaintiffs and Defendants as there would be one outcome as opposed to hundreds.

Second, while Plaintiffs only need establish one of the three sections set out in Rule 23(b), Plaintiffs have further argued that they can satisfy Rule 23(b)(3). While the Court has already found that Plaintiffs have established Rule 23(b)(1), the Court would further look to 23(b)(3). Pursuant to Rule 23(b)(3) the Court must analyze (1) whether the questions of law or fact common to the class predominate over any questions affecting only individual members and (2) that the class action is the superior way to handle adjudication of the claims. There are four additional considerations that the Court must consider when deciding Rule 23(b)(3) including: “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.”

Predominance

Plaintiffs have demonstrated that the common questions of both law and fact predominate over questions affecting individuals. While Defendant NOR argued that there are multiple individual issues especially as to fraud, this Court would note again that it is severing the fraud counts from the class action. Aside from the counts of fraud, Plaintiffs have pled Common Law Bad Faith and Breach of Fiduciary Duty. Here, Plaintiffs allege that MPC and its subsequent incarnations improperly acted when dealing with worker compensation claims and benefits to the entire class. A single issue may be the overriding factor regardless of numerous remaining individual questions. *Newberg on Class Actions* § 4.25 (4th Ed. 2002). The Montana Supreme Court has also explained that “the necessity for calculation of damages on an individual basis

should not preclude class determination when the common issues which determine liability predominate.” *McDonald*, 261 Mont. at 403-404, 862 P.2d at 1157.

Here, the Court finds that there are several issues surrounding this litigation. However, the primary issue involving the purported class action revolves around the Common Law Bad Faith in the mishandling of worker compensation claims by MPC, NWE, NOR and Putman & Associates. If, for instance, all hundred Common Law Bad Faith claims were tried before the Court, both Plaintiffs, Defendants, and the Court would have to repeatedly present the same witnesses, testimonies, and evidence ad nauseum. Therefore, Plaintiffs have presented a sufficient basis to demonstrate that one issue, like the Common Law Bad Faith claim regarding the mishandling of claims, predominates above all individual claims.

Superiority

Plaintiffs have demonstrated that a class action is the superior method to adjudicate the claims before the Court. The second portion of Rule 23(b)(3) requires the Court to determine that a class action is the superior method to deal with the claims before the Court. First, Plaintiffs have argued that there is no evidence that any individual Plaintiff is seeking to control the litigation and that most have opted into the class action. Second, the Plaintiffs have already proceeded with a class action in the Montana Worker Compensation Courts and many have received benefits and monies from penalties incurred on behalf of Defendants. Third, Butte-Silver Bow County is also a desirable forum as all Plaintiffs were employed by MPC in Butte-Silver Bow County that was principally located in Butte-Silver Bow County and is still principally located by NOR. Fourth, the difficulty of maintaining the class action will be minimal as the Plaintiffs’ attorneys have been working on this case and a case in the Montana Worker Compensation Court for quite some time. Here, there are several claims that consist of the same facts of question and law and that a single class would benefit Plaintiffs, Defendants, and Judiciary resources. Therefore, the Court is finding that the purported class action is the superior method to proceed with.

Conclusion

In conclusion, the Court finds that Plaintiffs' Motion to Certify a Class Action has been successfully established by Plaintiffs. While the Court finds that a Class Action will be the best method to adjudicate this matter, the Court is not convinced that the fraud allegations can be established through a mechanism such as a class action under Montana law. Fraud claims are highly fact intensive. Fraud claims involve among several elements specific findings regarding the actual individual's reliance on a representation which would make the use of a class action extremely difficult in that every individual in the action would have to provide proofs.

However, the Court does find that Plaintiffs have met their burden to proceed as a class action for the other remaining claims. Further, the Court would reiterate that the class factors have been met for each individual Defendant. Specifically, MPC was the primary employer when the claims occurred, NWE bought the assets and liabilities including the alleged mishandling of worker compensation claims, and that NOR is the restructured NWE. Lastly, Putman & Associates was the primary entity that processed and handled the claims that are in dispute.

Based on the foregoing, it is hereby

ORDERED that Chris J. Ragar, Esq., and Lon J. Dale, Esq., are appointed as class counsel in this case; and it is further

ORDERED that within twenty (20) days from the date of this Order class counsel shall prepare a form of notice to the class for the purpose of notifying class members of the Court's order certifying this case as a class action. Class counsel shall circulate the draft notice to counsel for Defendants for their review. If counsel cannot agree on the content of the notice, the Court shall be notified and will set a hearing to resolve any issues regarding the content of the notice and by what means the class members should receive the notice.

DATED this 30th day of September, 2009.



KURT KRUEGER
District Court Judge